

**IN THE MATTER OF AN OPPOSITION by
Mark Anthony Properties Ltd. to Application
No. 1047492 for the trade-mark DAVE’S MEXI
QUILA STINGER filed by David A. Nichol**

I The Proceedings

On February 18, 2000 David A. Nichol (the “Applicant”) filed an application to register the trade-mark DAVE’S MEXI QUILA STINGER (the “Mark”) based on proposed use in Canada in association with brewed alcoholic beverages, namely beer and alcoholic malt beverages (the “Wares”).

The application was advertised on July 18, 2001 in the *Trade-marks Journal* for opposition purposes. Mark Anthony Properties Ltd. (the “Opponent”) filed a statement of opposition on December 18, 2001 and the Registrar forwarded it to the Applicant on January 22, 2002.

The grounds of opposition pleaded are: the Wares are not described in ordinary commercial terms; the Applicant did not comply with the provisions of s. 30(i) of the *Trade-marks Act*, 1985 R.C.S. c. T-13, (the “Act”); the Mark is not registrable as either clearly descriptive or deceptively misdescriptive of the character or quality of the Wares and/or their place of origin; the Mark is not registrable being the name in any language of any of the Wares and is confusing with the following registered trade-marks:

- MEXICALI TMA508667 for beer;
- MEXIQUITA TMA364091 for distilled alcoholic beverages;
- STING TMA385417 for fruit flavoured alcoholic beverages.

Also the Opponent pleads that the Applicant is not the person entitled to the registration of the Mark because it is confusing with one or more of the previously used trade-marks listed above as well as with a trade-mark for which an application has been previously filed and is currently pending in Canada, namely:

- ZEQUILA Application 1037282 for brewed alcoholic beverages, namely beer; and malt based alcoholic beverages.

Finally the Opponent raises the issue of distinctiveness of the Mark in view of the facts described under the other grounds of opposition.

The Applicant filed on February 12, 2002 a counter statement denying essentially all grounds of opposition pleaded.

The Opponent's evidence consists of the affidavits of Anthony Von Mandl, Jeannine Summers and Catherine Dux as well as certified copies of the registrations and the application identified above. The Applicant filed the affidavits of Ian Kerr and Deborah Eatherley. A cross-examination order was issued with respect to the Opponent's deponents but only Anthony Von Mandl was cross-examined and the transcript of such cross-examination was filed together with the answers to the undertakings. The Opponent filed the affidavit of Hiyasmin Matias as reply evidence.

Both parties filed written arguments and only the Opponent was represented at the oral hearing. In its written arguments the Opponent advised the Registrar that it would not pursue the grounds of opposition under s. 30 and s. 12(1)(c) of the Act. At the oral hearing the Opponent further declared that it would only rely upon its registration and use of its trade-mark STING with respect to its grounds of opposition based on s. 12(1)(d) and s. 16(3) of the Act.

II General Principles Applicable to all Grounds of Opposition

The Applicant has the legal onus to show that its application complies with the provisions of the Act, but there is however an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once this initial burden is met, the Applicant still has to prove, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate*

Ltd., 3 C.P.R. (3d) 325, at pp. 329-330; *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Wrangler Apparel Corp. v. The Timberland Company*, [2005] F.C. 722].

The relevant dates for the analysis of the grounds of opposition raised are:

- The filing date of the application (February 18, 2000) with respect to the registrability of the Mark under s. 12(1)(b) of the Act [see *Fiesta Barbeques Limited v. General Housewares Corporation* (2003), 28 C.P.R. (4th) 60];
- The date of the Registrar's decision with respect to the registrability of the Mark under s. 12(1)(d) of the Act [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 at 424 (F.C.A.)];
- The filing date of the application (February 18, 2000) when determining the entitlement to the registration of the Mark, where the application is based on proposed use [see s. 16(3) of the Act];
- The filing date of the statement of opposition (December 18, 2001) is generally accepted to be the relevant date to determine the distinctiveness of the Mark [see *Andres Wines Ltd. and E & J Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.) and *Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)].

III Registrability of the Mark

The Opponent is alleging that the Mark is not registrable pursuant to s. 12(1)(d) of the Act as it would be confusing with its registered trade-mark STING, certificate of registration TMA385417, in association with fruit flavoured alcoholic beverages and also pursuant to the provisions of s. 12(1)(b), as it would be deceptively misdescriptive of the Wares. I shall discuss in the abovementioned order each of these contentions.

The Opponent has satisfied its initial burden with respect to the ground of opposition based on s. 12(1)(d) of the Act by filing a certified copy of registration TMA385417. Therefore I must

determine if, on a balance of probabilities, the Mark is likely to cause confusion with the Opponent's trade-mark STING.

The test to determine this issue is set out in s. 6(2) of the Act and I must take into consideration all the relevant surrounding circumstances, including those listed in s. 6(5): the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; the length of time the trade-marks or trade-names have been in use; the nature of the wares, services, or business; the nature of the trade; and the degree of resemblance between the trade-marks or trade-names in appearance, or sound or in the ideas suggested by them. Those criteria are not exhaustive and it is not necessary to give each one of them equal weight [see *Clorox Co. v. Sears Canada Inc.* (1992), 41 C.P.R. (3d) 483 (F.C.T.D.) and *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)]. I refer to the decision of the Supreme Court of Canada in *Mattel, Inc. v. 3894207 Canada Inc.*, (2006) 49 C.P.R. (4th) 321 for a recent analysis of those criteria.

Even though the Opponent's trade-mark STING is a word in the English language, it is inherently distinctive when used in association with alcoholic beverages while the Mark contains the word STINGER which is descriptive of a type of cocktail as it appears from the evidence filed by both parties. I refer in particular to Ian Kerr's affidavit, an employee of the Applicant's agent firm, to which were attached extracts of various books including a book entitled "The New American Bartender's Guide" wherein a description of a cocktail drink named "stinger" is provided. It is a mixture of brandy and liquor known as crème de menthe. There are other cocktail drink names that include the word "stinger" such as: vodka stinger, Louisville stinger, stinger sour, Saskatoon stinger, tequila stinger, International stinger, Italian stinger, peppermint stinger and Roman stinger wherein other liquors are substituted for brandy or crème de menthe. As for Ms. Dux, she has been a legal secretary employed by the Opponent's agent firm. She visited a couple of bars and requested a beverage known as "stinger" and obtained a cocktail made of brandy and crème de menthe or peppermint schnapps.

Even if I were to disregard all the evidence filed by both parties on this issue, on the basis of hearsay evidence as most of it are Internet searches, save and except for some of the allegations

contained in the Dux affidavit and extracts of books filed by Mr. Kerr, I am entitled to consult dictionaries for meanings of words [see *Insurance Co. of Prince Edward Island v. Prince Edward Island Insurance Co.* (1999) 2 C.P.R. (4th) 103]. I consulted the *Webster's Ninth New Collegiate Dictionary* and the word "stinger" is defined as follow:

(...) 3. A cocktail consisting of brandy, white crème de menthe, and sometimes lime juice.

I am satisfied that the word "stinger" is the name of a cocktail. Therefore the Mark is less inherently distinctive than the Opponent's registered trade-mark STING as the inclusion of the word "stinger" as part of the Mark associates it with a cocktail drink.

The second component of the first criterion described in s. 6(5)(a) is the extent to which the trade-marks have been made known in Canada.

Mr. Von Mandl has been the Opponent's and its wholly owned subsidiary 359148 British Columbia Ltd.'s President and founder. He does explain the corporate structure of each of these entities. He states that the Opponent exercises direct control over the quality and character of the products sold under its various trade-marks. There are two other entities referred thereto in his affidavit: Mark Anthony Cellars Ltd. and Mark Anthony Brands Ltd. (The Opponent, those two other entities and 359148 British Columbia Ltd. shall be referred hereinafter as "Mark Anthony Co.").

Mark Anthony Co. is in the business of selling beverages. It has imported, manufactured, distributed and sold alcoholic beverages continuously for over 25 years. The Opponent now owns certificate of registration TMA385417 for the trade-mark STING. The deponent filed various labels, a sample of a box and photographs of bottles all bearing the trade-mark STING.

Amongst the labels filed are:

- STING Tequila Lime
- STING Tequila Lime Margarita
- STING Strawberry Margarita

Those products have been sold all across Canada since 1991, except in Quebec and Prince Edward Island. The sales of products across Canada bearing the trade-mark STING from 1991 to 2002 amounted to close to \$25 million.

Mr. Von Mandl explains, in details from paragraphs 16 to 23 inclusive to his affidavit, the various campaigns put in place in Canada to promote over the years the STING products. He filed nineteen (19) different exhibits to demonstrate the various means used to promote and advertised the products bearing the trade-mark STING, including t-shirts, posters, banners, flyers and baseball caps. From this evidence I conclude that the Opponent's trade-mark STING was known to some extent in Canada.

The Applicant did not file any evidence of use of the Mark in association with the Wares. However there is some indication that the Mark might be used in Canada in association with the Wares as it appears from extracts of the website thebeerstore.ca, filed as an exhibit to Mr. Von Mandl's affidavit, wherein the Wares bearing the Mark are described. Even if I were to consider such evidence, as it might well be inadmissible hearsay evidence, we have no information as to when the Wares were first offered for sale in Canada and the extent of the Applicant's sales.

Overall the first and second criteria under s. 6(5) of the Act favours the Opponent.

As for the nature of the wares it is the statement of wares in the application and the statement of wares in the registration that govern the assessment of the likelihood of confusion under s.12(1)(d) of the Act [see *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (F.C.A.) and *Miss Universe, Inc. v. Bohna* (1994), 58 C.P.R. (3d) 381 (F.C.A.)]. Both parties' wares fall in the general class of alcoholic beverages products. For an analysis on this issue I refer to *Carling Breweries Ltd. v. Registrar of Trade Marks* (1972), 8 C.P.R. (2d) 247, *John Haig & Co. Ltd. v. Haig Beverages Ltd.* (1975), 24 C.P.R. (2d) 66, *Pernod Ricard v. Molson Breweries*, 44 C.P.R. (3d) 359 and *Pernod Ricard Canada Ltd. v. Maple Leaf Distillers Inc.*; 2007 62 C.P.R. (4th) 152.

There is no evidence in the record that would enable me to conclude that the channels of trade would differ. Therefore the criteria set out in s. 6(5)(c) and (d) of the Act also favour the Opponent.

The degree of resemblance is the most important factor when assessing the likelihood of confusion between two trade-marks, especially where the wares in issue are of the same general class. Mr. Justice Cattanach in *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstering Ltd.* (1980), 47 C.P.R. (2d) 145 at par. 28 defined the issue in the following terms:

Realistically appraised it is the degree of resemblance between trade marks in appearance, sound or in ideas suggested by them that is the most crucial factor, in most instances, and is the dominant factor and other factors play a subservient role in the over-all surrounding circumstances.

He also described the test of confusion in the following words in *Canadian Schenley Distilleries Ltd. v. Canada's Manitoba Distillery Ltd.* (1975), 25 C.P.R. (2d) 1 at par. 14:

To determine whether two trade marks are confusing one with the other it is the persons who are likely to buy the wares who are to be considered, that is those persons who normally comprise the market, the ultimate consumer. That does not mean a rash careless or unobservant purchaser on the one hand, nor on the other does it mean a person of higher education, one possessed of expert qualifications. It is the probability of the average person endowed with average intelligence acting with ordinary caution being deceived that is the criterion and to measure that probability of confusion the Registrar of Trade Marks or the Judge must assess the normal attitudes and reactions of such persons.

In considering the similarity of trade marks it has been held repeatedly that it is not the proper approach to set the marks side by side and to critically analyze them for points of similarities and differences, but rather to determine the matter in a general way as a question of first impression. I therefore propose to examine the two marks here in dispute not for the purpose of determining similarities and differences but rather to assess the attitude of the average reasonable purchaser of the wares as a matter of first impression.»

Therefore I must compare the trade-mark STING with DAVE'S MEXI QUILA STINGER. The only similarity is the inclusion of part of the Opponent's trade-mark in the Mark. The ideas suggested by the parties' trade-marks are different: the Mark gives the idea of someone's exotic own recipe of a drink known as a "stinger" while the Opponent's trade-mark gives the idea of

pain. Moreover, as a whole, both visually and in sound there is little similarity between the marks. In this case, the differences between the marks namely the addition of the words DAVE'S, MEXI and QUILA serve to distinguish the Mark from the Opponent's trade-mark STING. This factor clearly favours the Applicant.

As a further surrounding circumstance the Applicant introduced the state of the Register evidence through the affidavit of Ms. Eatherley who was, at the time of execution of her affidavit, a law clerk employed by the Applicant's agent firm. She filed extracts of the register showing that the Applicant is the owner of twenty-one (21) trade-mark applications or registrations, all in association with beer or malt based alcoholic beverages, which incorporate the first name Dave as part of those cited marks. There is no argument advanced by the Applicant in its written argument with respect to that part of the evidence in relation with the determination of the registrability of the Mark under s. 12(1)(d) of the Act. The fact that the Applicant obtained the registration of other trade-marks having as a component the word "Dave" does not give to the Applicant the automatic right to obtain the registration of the Mark. Reference is made to s. 19 of the Act. In any event, as it will appear hereinafter from my conclusion reach on this ground of opposition, the fact that I do not intend to take into consideration at this stage that portion of the evidence filed by the Applicant will be of no consequence to it.

Applying the test of the imperfect recollection of an average consumer of the Opponent's trade-mark STING, I do not think that there is a likelihood of confusion between STING and DAVE'S MEXI QUILA STINGER when used in association with the Wares in view of the little resemblance between the marks in issue. The Applicant having met its legal onus, I dismiss the ground of opposition based on s. 12(1)(d) of the Act.

The next issue is to determine whether the Mark is deceptively misdescriptive of the Wares and thus not registrable as per s. 12(1)(b) of the Act.

As discussed earlier, the evidence in the record does establish that the word "stinger" is defined as a cocktail made of brandy and liquor known as crème de menthe. The Opponent's argument is

that the Mark is deceptively misdescriptive of the Wares, as the general public would associate the Mark with a spirit-based beverage and not beer or malt beverages.

There is a distinction to be made between s. 12(1)(c) where the Opponent has to prove that the trade-mark is the name in any language of the wares while under s. 12(1)(b) the trade-mark has to be descriptive or deceptively misdescriptive. Rightly so the Opponent did not pursue the former ground of opposition since the Mark is not the name of the Wares in any language. However can it be that the Mark, in the English language be deceptively misdescriptive of the Wares? Again there is no issue that it does not clearly describe the Wares. There is no doubt that if the trade-mark applied for were STINGER that it would be deceptively misdescriptive of the Wares. But I must look at the Mark as a whole [see *Atlantic Promotions Inc. v. Registrar of Trade-marks* (1984), 2 C.P.R. (3d) 183 (F.C.T.D.)].

At the oral hearing the Opponent argued that if the dominant feature of a trade-mark is deceptively misdescriptive, then the trade-mark as a whole would not be registrable pursuant to s. 12(1)(b) of the Act. The Opponent further argues in the present case that the dominant feature of the Mark would be the word “stinger”. Because the Wares are not spirit based beverages, the Mark, as a whole, would be deceptively misdescriptive and reference is made to *Lake Ontario Cement Ltd. v. Registrar of trade-marks* (1976) 31 C.P.R. (2d) 103; *T.G. Bright & Co. v. Institut national des appellations d'origine des vins & eaux-de-vie* (1986) C.P.R. (3d) 239; *Canadian Council of Professional Engineers v. John Brooks Co.* (2004) , 35 C.P.R. (4th) 507] and *Plantguard Systems of Canada ltd. v. Fuel Guard Industries ltd* (1980) 61 C.P.R. (2d) 173].

The applicable test has been well described in *242183 Ontario Ltd. v. Black Forrest Inn Inc.* (1984), 3 C.P.R. (3d) 23 wherein the Registrar stated:

SECTION 12(1)(B)

3 The opponent alleges that the applicant's trade mark is not registrable having regard to s. 12(1)(b) because (i) "the words 'black forest inn' are clearly descriptive or deceptively misdescriptive of the character or quality of the services of the applicant or of their place of origin"; (ii) "the word 'Inn' is deceptively misdescriptive of the

services as the applicant does not offer lodging to its customers" and (iii) "the words 'Black Forest' are commonly used in the restaurant business to describe types of food".

4 In assessing the question of descriptiveness, a trade mark must not be dissected into its component parts but rather must be considered as a whole. Accordingly, even if as the opponent alleges the words "Black Forest Inn" are either clearly descriptive or deceptively misdescriptive, s. 12(1)(b) does not prohibit registration unless the applicant's trade mark when considered as a whole is either clearly descriptive or deceptively misdescriptive. This is an important consideration in this case since the applicant's trade mark consists not only of the words "Black Forest Inn" but also of the words "willkommen zum welcome to the" and certain design features including what appear to be representations of flowers, trees, a turkey and a moose head. The opponent argued that the words "Black Forest Inn" so dominate the applicant's trade mark that if they are held to be clearly descriptive or deceptively misdescriptive then the trade mark as a whole must necessarily also be clearly descriptive or deceptively misdescriptive.

5 A similar question was considered by Dube J. in *Lake Ontario Cement Ltd. v. Registrar of Trade Marks* (1976), 31 C.P.R. (2d) 103. In that case the applicant sought to register a composite mark in which the letter "P" and the word "Premier" appeared in a parallelogram format as applied to the sale of sand, gravel, ready-mixed concrete, concrete blocks and bricks. The word "Premier" was disclaimed. The registrar rejected the application on the ground that the mark was either clearly descriptive or deceptively misdescriptive. In allowing the appeal from the registrar's decision, Dube J. stated the following [at pp. 109-10](#):

It does appear to me, from a review of the above-mentioned cases that a disclaimer would allow the registration of a trade mark which contained unregistrable material, provided that apart from the unregistrable letters or words, there remained a distinctive feature, or a pictorial representation, which would make the mark as a whole distinctive from other marks, and provided that the unregistrable letters or words were so unregistrable because clearly descriptive, or non- distinctive.

It is not difficult to visualize the appellant's trade mark without the word "Premier": there remains a large capital "P" standing in a parallelogram. It would be clearly registrable if the accompanying word "Premier" were unregistrable merely because "clearly descriptive" ...

But the Registrar claims that the word "Premier" is unregistrable for two reasons: it is clearly descriptive, and it is deceptively misdescriptive. In my view a disclaimer ought not be used in relation to a deceptively misdescriptive matter so as to render the mark as a whole registrable when the unregistrable

matter is the dominant feature of the composite mark. After all, the disclaimer does not appear on the mark and the deception stands visually overwhelming.

In my view, however, the word "Premier" is not deceptively misdescriptive. It might be misdescriptive of the wares in the sense that it connotes a degree of quality which might not be attained by the wares, but the possible misdescription is not necessarily deceptive. Lloyd-Jacob, J., observed in *Re Seligmann's Application* (1953), 71 R.P.C. 52, that a mark having an indirect reference to a quality of the goods is not necessarily deceptive because the owner might apply it to goods not having such quality. The trade mark PURE WOOL for instance would be deceptive if applied to cotton goods. But the trade mark PREMIER although certainly descriptive and laudatory, and possibly misdescriptive should not be ruled out of hand as being necessarily deceptive, simply because the concrete blocks and bricks associated thereto might not always be of the finest quality. Otherwise all laudatory terms, such as "Supreme", or "Super", or "Excellent", or "Premium", or "Perfect" or "Superior", or even just plain "Standard" would be forever banned as deceptive trade marks.

The word "Premier" being unregistrable because clearly descriptive, and not being deceptively misdescriptive, and the appellant having disclaimed the right to its exclusive use apart from the trade mark, the trade mark as a whole becomes registrable.

I am therefore allowing the appeal with costs.

6 In the present case the words alleged by the opponent to be descriptive, i.e., "Black Forest Inn" have not been disclaimed; however, I do not consider that this makes the principle of the Lake Ontario Cement case inapplicable

(...)

Applying therefore the approach set forth by Dube J. in the Lake Ontario Cement case the first question to be considered is whether apart from the words "Black Forest Inn" alleged by the opponent to be unregistrable there remains "a distinctive feature, or a pictorial representation, which would make the mark as a whole distinctive from other marks". I have concluded that there is since in my view there is at least as much distinctive matter in the applicant's trade mark apart from the words "Black Forest Inn" as there is apart from the word "Premier" in the trade mark considered in the Lake Ontario Cement case.

8 The second question to be considered is whether the words "Black Forest Inn" are deceptively misdescriptive. The opponent submits first that the words "Black Forest" used in association with restaurant services would indicate that the restaurant services have a German character and that accordingly if the applicant's mark is used in association with restaurant services that do not have a German character it would be deceptively misdescriptive. Having regard to Dube J.'s comments in the Lake

Ontario Cement case, I do not accept this submission. Even assuming the words "Black Forest" to be deceptively misdescriptive if the restaurant services are not of German character, they should not be ruled out of hand as being necessarily deceptively misdescriptive. The opponent secondly submits that the words "Black Forest" are deceptively misdescriptive of the place of origin of the applicant's restaurant services in that they indicate that the services originate from the Black Forest region of Germany. I do not accept this submission since I doubt that the average person of ordinary intelligence would as a matter of first impression be likely to be deceived into thinking that the restaurant services did in fact originate from Germany. The opponent thirdly submitted that the word "Inn" indicates that lodging is provided and would be deceptively misdescriptive of the applicant's restaurant services if lodging is not provided. I consider this submission to be without foundation since although the word "Inn" is often used to refer to a place of lodging it is also commonly used to refer to a tavern. In this regard reference may be made to Webster's Third New International Dictionary which for the word "Inn" includes the definition: "a place of public entertainment that does not provide lodging: TAVERN".

9 In summary, I consider that apart from the words "Black Forest Inn" there are distinctive features which would make the mark as a whole distinctive from other marks and that even if the words "Black Forest Inn" are clearly descriptive they are not deceptively misdescriptive. Accordingly, I conclude that the applicant's trade mark as a whole does not contravene the provisions of s. 12(1)(b) of the Trade Marks Act

Applying the same reasoning to the case at bar I have to conclude that the dominant feature of the Mark is not the element "STINGER". Other portions of the Mark are distinctive words such as MEXI and QUILA. The addition of a misdescriptive word does not necessarily render the Mark, as a whole, unregistrable under s. 12(1)(b) of the Act.

I conclude for these reasons that the Mark is not deceptively misdescriptive of the Wares and consequently I dismiss the ground of opposition under s. 12(1)(b) of the Act.

IV The other grounds of opposition

Because the issue of confusion is the determining factor in assessing whether the Applicant is entitled to register the Mark under s. 16(3), I dismiss this ground of opposition for the same reasons exposed in my analysis of the registrability of the Mark under s. 12(1)(d). The difference in the relevant dates (the date of the Registrar's decision in the case of s. 12(1)(d) versus the

filing date of the application under s. 16(3) of the Act) would have no consequence on such analysis.

Mr. Justice Denault stated in *Matilda Publications Inc. v. Clarco Communications Ltd.* (1994), 54C.P.R. (3d) 418:

While distinctiveness is quite often determined as part of an evaluation of whether the proposed trade-mark is confusing with another trade-mark within the meaning of section 6 of the Act, it is possible to refuse an application for registration on the basis of non-distinctiveness independent of the issue of confusion, provided the ground is raised in opposition.

The Act defines a trade-mark as a “mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others”. It is therefore not surprising that the Federal Court in *Canadian Council of Professional Engineers v. APA - The Engineered Wood Assn.* (2000) 7 C.P.R. (4th) 239 concluded that a trade-mark that is deceptively misdescriptive is necessarily not distinctive. Therefore the ground of opposition based on lack of distinctiveness of the Mark is also maintained.

The Opponent failed to meet its initial burden with respect to the grounds of opposition based on s. 12(1)(c) and 30(i) of the Act. Consequently they are also dismissed.

V CONCLUSION

The Applicant has satisfied its burden to prove, on a balance of probabilities, that the Mark is registrable and distinctive and that it is entitled to the registration of the Mark.

Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject, pursuant to s. 38(8) of the Act, the Opponent's opposition to the registration of the Mark in association with the Wares.

DATED, IN BOUCHERVILLE, QUEBEC, THIS 3rd DAY OF SEPTEMBER 2008.

Jean Carrière,
Member, Trade-marks Opposition Board